

13-1976-cv
Hicks v. Vane Line Bunkering, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Submitted: January 15, 2014 Decided: April 17, 2015)

Docket No. 13-1976-cv

CIRO CHARLES HICKS,
Plaintiff-Appellee,

v.

TUG PATRIOT, In Rem,
Defendant,

VANE LINE BUNKERING, INC.,
Defendant-Appellant.

Before WINTER, STRAUB, and HALL, Circuit Judges.

Appeal from a denial by the District Court for the Southern District of New York (Katherine B. Forrest, Judge) of appellant's motion to set aside a jury verdict. The jury found that appellant willfully breached its maritime law maintenance and cure obligations and awarded both compensatory and punitive damages to appellee. Further, based on the jury's finding of willful misconduct, the district court granted appellee's motion for attorney's fees. On appeal, we consider whether the district court abused its discretion in finding that the record supported the jury's pain-and-suffering award, and whether a court may

1 award both punitive damages and attorney's fees in an action for
2 maintenance and cure.

3 Affirmed.

4 Paul T. Hofmann, Hofmann &
5 Schweitzer, New York, NY, for
6 Plaintiff-Appellee.

7
8 Michael D. Wilson, John J. Sullivan
9 and Caspar F. Ewig, Hill Rivkins
10 LLP, New York, NY, for Defendant-
11 Appellant.

12
13 WINTER, Circuit Judge:

14 Vane Line Bunkering, Inc. appeals from a money judgment for
15 Ciro Charles Hicks following a jury trial before Judge Forrest.
16 The jury found that appellant breached its maritime law duty of
17 providing maintenance and cure¹ following a shoulder injury Hicks
18 sustained while working on board the Tug PATRIOT. It awarded
19 Hicks the unpaid maintenance and cure and damages for pain and
20 suffering caused by the breach. Further, the jury found that
21 appellant's conduct was willful and awarded punitive damages.
22 Finally, based on the jury's finding of willfulness, the district
23 court granted Hicks's motion for reasonable attorney's fees.

24 Appellant argues that the evidence that appellant's acts and

¹"Maintenance and cure" refers to the well-settled doctrine of maritime law that a seaman "injur[ed] in the performance of his duty is entitled to be treated and cured at the expense of the ship." The Osceola, 189 U.S. 158, 173 (1903), superseded by statute on other grounds, The Jones Act, 46 U.S.C. § 30104 (creating a statutory cause of action for negligence). Maintenance includes a seaman's living allowance and unearned wages. Gilmore & Black, The Law of Admiralty § 6-12, at 267-68 (2d ed. 1975).

1 omissions caused Hicks's pain and suffering was insufficient as a
2 matter of law. Although it arguably waived the argument,
3 appellant also objects to the award of punitive damages in
4 addition to and/or in excess of the amount of attorney's fees.
5 We affirm.

6 BACKGROUND

7 In light of the jury verdict for appellee, we view the trial
8 record in the light most favorable to him. See Kosmynka v.
9 Polaris Indus., Inc., 462 F.3d 74, 77 (2d Cir. 2006).

10 Hicks was employed by appellant as a deckhand on the Tug
11 PATRIOT. On April 21, 2009, while on deck handling heavy towing
12 gear, he injured his shoulder. Two days later, an orthopedist
13 diagnosed a possible rotator cuff tear. The doctor injected
14 Hicks with cortisone to relieve the pain and gave him a fit-for-
15 duty slip. Prior to returning to work, Hicks was required to see
16 a company doctor, who determined that Hicks was not fit for duty.
17 Subsequently, appellant confirmed in writing its obligation under
18 maritime law to pay sums for Hicks's maintenance and cure,
19 reasonable medical expenses and maintenance costs until his full
20 recovery, maximum improvement, or until his condition was
21 declared permanent.

22 On July 1, 2009, Hicks underwent surgery on his shoulder.
23 He experienced significant discomfort before and after the
24 surgery. For several months following the procedure, he received

1 in-office and at-home physical therapy while continuing to
2 experience significant pain. In December 2009, he informed his
3 treating physician that he still had significant limitations of
4 range of motion of his arm.

5 Appellant hired a private investigator to videotape Hicks
6 surreptitiously. The video captured him on videotape planting a
7 small tree and playing with his grandson. When Hicks's doctor
8 requested funding for an additional MRI scan, he was shown this
9 footage and a document detailing the physical requirements of
10 Hicks's job. Based on this video and the suggestion -- which
11 appellant now admits was false -- that Hicks's job required only
12 light lifting, the doctor determined that Hicks was fit for duty.
13 Appellant accordingly informed Hicks that it would terminate
14 maintenance and cure payments effective May 9, 2010.

15 Beginning in August 2010, Hicks sought continuing care from
16 a second doctor, who diagnosed a recurrent rotator cuff tear. In
17 February 2011, this doctor recommended another surgery plus six
18 months of rehabilitation to repair the additional damage. Under
19 financial pressure caused by the meager maintenance and cure
20 appellant had paid him -- \$15 per day compared to actual costs of
21 \$69.67 per day for food and lodging -- and had now terminated,
22 Hicks returned to work while still injured. Severe financial
23 difficulties caused him to miss some of his physical therapy
24 appointments. During this time, his house was put into

1 foreclosure, and he was unable to pay for health insurance.

2 In November 2011, Hicks brought the present action. His
3 claims were based on negligence under the Jones Act and the
4 maritime doctrines of unseaworthiness and maintenance and cure.
5 The jury found that appellant had not been negligent and the
6 PATRIOT was seaworthy, but that appellant had breached its
7 obligation of maintenance and cure by paying Hicks an
8 insufficient per diem and prematurely ceasing payments.

9 The jury awarded \$77,000 in compensatory damages for past
10 maintenance and cure from April 22, 2009 to the date of the
11 verdict; \$16,000 in future maintenance and \$97,000 in future cure
12 through April 2013; and \$132,000 in compensation for past pain
13 and suffering. The jury also found that appellant's failure to
14 pay maintenance and cure was unreasonable and willful and awarded
15 \$123,000 in punitive damages. Based on the finding of
16 willfulness, the district court, upon a motion under Fed. R. Civ.
17 P. 54(d), granted Hicks an additional \$112,083.77 in attorney's
18 fees.

19 Appellant moved, unsuccessfully, for judgment as a matter of
20 law or a new trial under Fed. R. Civ. P. Rules 50(b) and 59
21 respectively. This appeal followed.

22 DISCUSSION

23 We review a denial of a Rule 50(b) motion de novo and the
24 denial of a Rule 59 motion for abuse of discretion. See Fabri v.

1 United Techs. Int'l, Inc., 387 F.3d 109, 119 (2d Cir. 2004);
2 Devlin v. Transp. Commc'ns Int'l Union, 175 F.3d 121, 131-32 (2d
3 Cir. 1999). With respect to attorney's fees, because "resolution
4 of the district court's grant of attorney's fees implicates a
5 question of law, our review is de novo." Garcia v. Yonkers Sch.
6 Dist., 561 F.3d 97, 102 (2d Cir. 2009).

7 We, therefore, consider: (i) the evidence underlying the
8 award of pain and suffering damages, and (ii) the award of both
9 punitive damages and attorney's fees.

10 a) Pain and Suffering Damages

11 An injured seaman may recover damages if the shipowner's
12 failure to pay maintenance and cure caused pain and suffering by
13 prolonging or aggravating the initial injury. See Vaughan v.
14 Atkinson, 369 U.S. 527, 539 (1962) (Stewart, J., dissenting);
15 Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932);
16 Williams v. Kingston Shipping Co., 925 F.2d 721, 723 (4th Cir.
17 1991) (discussing availability of "money damages for any
18 prolongation or aggravation of the physical injury"); accord
19 Hines v. J. A. LaPorte, Inc., 820 F.2d 1187, 1190 (11th Cir.
20 1987) (per curiam) (pain and suffering damages awarded where
21 failure to pay maintenance "aggravated Hines' condition,
22 prolonged his pain and suffering, and lengthened the time
23 required for him to reach maximum cure").

24 In arguing that the evidence was insufficient as a matter of

1 law to support an award for pain and suffering, appellant relies
2 heavily on statements by Hicks that his condition did not
3 significantly improve after the initial injury. Appellant argues
4 from these statements that Hicks's pain and suffering were
5 entirely attributable to the original injury and not to
6 appellant's failure to fulfill its maintenance and cure duties.
7 However, under our caselaw, a plaintiff need not show an
8 additional discrete injury or illness resulting from the failure
9 to pay maintenance and cure. See Rodriguez Alvarez v. Bahama
10 Cruise Line, Inc., 898 F.2d 312, 314-15 (2d Cir. 1990) (duty to
11 furnish maintenance and cure continues until seaman fully
12 recovers). Rather, the prolonging or worsening of a condition as
13 a result of the employer's breach will sustain a pain and
14 suffering damages award. See Messier v. Bouchard Transp., 688
15 F.3d 78, 84-85 (2d Cir. 2012) (duty to pay maintenance and cure
16 extends to aggravation of preexisting illness). And, in
17 maintenance and cure cases, "doubts regarding a shipowner's
18 liability . . . should be resolved in favor of the seamen."
19 Padilla v. Maersk Line, Ltd., 721 F.3d 77, 81-82 (2d Cir. 2013),
20 cert. denied, 134 S. Ct. 1309 (2014) (citing Atkinson, 369 U.S.
21 at 532).

22 In the present case, the jury could easily have found that
23 appellant's discontinuation of maintenance and cure benefits
24 caused injuries to Hicks, both physical and otherwise. It could

1 also have found that the insufficient payments forced Hicks back
2 to work before physical therapy could render him fit. Indeed,
3 Hicks's second doctor diagnosed a recurrent rotator cuff tear and
4 determined the need for a second surgery, which would have
5 required yet another long bout of physical therapy. Furthermore,
6 Hicks suffered emotional distress stemming from the loss of his
7 home and health insurance, both of which could have been found by
8 the jury to have been caused, at least in part, by appellant's
9 inadequate payments and discontinuation of benefits. See, e.g.,
10 Sims v. U.S. of Am. War Shipping Admin., 186 F.2d 972 (3d Cir.),
11 cert. denied, 342 U.S. 816 (1951).

12 Although appellant attempts to cast the causation issue as
13 one of law, the causal link between the cessation of benefits and
14 the harms to Hicks for which damages are sought was for
15 determination by the jury. Based on the evidence, therefore, the
16 district court did not abuse its discretion in holding that the
17 jury acted reasonably in its award for pain and suffering.

18 b) Attorney's Fees in Addition to Punitive Damages

19 In the district court, the parties did not squarely address
20 the issue of the amount of punitive damages recoverable in a
21 maintenance and cure action. However, because this issue is a
22 pure question of law, we may reach it regardless of waiver. See
23 Magi XXI, Inc. v. Stato della Città del Vaticano, 714 F.3d 714,
24 724 (2d Cir. 2013) ("[W]e have exercised our discretion to hear

1 otherwise waived arguments . . . where the argument presents a
2 question of law and there is no need for additional fact-
3 finding.")(internal quotation marks and citations omitted).

4 We perceive a need to address the issue here. The judgment
5 of the district court here is inconsistent with a decision of
6 another district court in this circuit. McMillan v. Tug Jane A.
7 Bouchard, 885 F. Supp. 452, 466 (E.D.N.Y. 1995) (holding that
8 punitive damages in maintenance and cure cases are limited to
9 reasonable attorneys' fees). The conflict is the result of our
10 decision in Kraljic v. Berman Enter., Inc., 575 F.2d 412, 415-16
11 (2d Cir. 1978). That decision held that, in maintenance and cure
12 cases, the amount of punitive damages is limited to the amount of
13 reasonable attorneys' fees.

14 As a result, we examine the decision in Kraljic, and the one
15 by the Supreme Court, Vaughan v. Atkinson, 369 U.S. 527 (1962),
16 that spurred it, in some detail. We also examine developments
17 after Kraljic, including a Supreme Court decision, Atlantic
18 Sounding Co. v. Townsend, 557 U.S. 404 (2009), that undermines
19 Kraljic.

20 Kraljic, 575 F.2d at 416, reluctantly concluded that
21 limiting punitive damages in maintenance and cure cases to
22 reasonable attorney's fees was required by Atkinson. Atkinson
23 was a cryptic decision embodied in an opinion written by Justice
24 Douglas. It involved a shipowner's failure to pay maintenance

1 and cure, after which the ill seaman successfully sought damages
2 for the unpaid amounts and counsel fees for being forced to go to
3 court to remedy the owner's breach.

4 Atkinson's discussion of the attorney's fees issue was all
5 of three paragraphs long and conflated the issues of compensatory
6 and punitive damages. Atkinson noted that the seaman's claim for
7 attorney's fees did not concern taxable costs; rather, it
8 involved "necessary expenses" incurred as a result of the owner's
9 breach of duty, 369 U.S. at 530, i.e. being "forced to hire a
10 lawyer . . . to get what was plainly owed him," id. at 531.
11 However, after this language, which clearly sounds in
12 compensatory damages, Kraljic, 575 F.2d at 413 ("This might lead
13 one to conclude that the award of attorney's fees was
14 compensatory"), the Atkinson opinion then noted that the
15 owner's conduct involved both the lack of any investigation into
16 the seaman's claim and silence as to the claim's merits. 369
17 U.S. at 530-31. The Atkinson opinion described this conduct as a
18 "recalcitrance" that was "callous," "willful," and "persistent."
19 Id. This language was deemed by us to sound in punitive damages.
20 Kraljic, 575 F.2d at 414 ("Recovery of [attorney's] fees is
21 therefore based upon the traditional theory of punitive
22 damages.")

23 The dissenters in Atkinson argued that there was no basis
24 for an award of counsel fees as compensatory damages but that the

1 conduct of the owner might support an award of "exemplary damages
2 in accord with traditional concepts of the law of damages." 369
3 U.S. at 540. The dissent noted, however, that punitive damages
4 "would not necessarily be measured" by counsel fees but might
5 provide "indirect compensation for such expenditures." Id.

6 Our decision in Kraljic read Atkinson to authorize punitive
7 damages in maintenance and cure cases but to limit such damages
8 to an award of reasonable attorney's fees. Kraljic, 575 F.2d at
9 416. We did so reluctantly, believing that we were "constrained"
10 by Atkinson. Id. However, our rationale for reading Atkinson to
11 impose such a limit, as best we can determine at this distance in
12 time, was that Atkinson authorized an award of attorney's fees
13 only where the owner's conduct was sufficiently egregious to
14 justify a punitive award. Based on the Atkinson dissent's view
15 that a punitive award, but not one measured by fees, was
16 available and our view in Kraljic that "[t]he seaman surely is
17 not entitled to separate awards of both [punitive damages and
18 fees]," id. at 414, we inferred that the Atkinson majority
19 authorized an award of punitive damages but limited it to
20 attorney's fees.

21 Lost in this chain of reasoning was the fact that the seaman
22 in Atkinson sought only counsel fees and not punitive damages.
23 The Supreme Court majority, therefore, had no reason to consider,
24 much less discuss, the availability of punitive damages in excess

1 of, or in addition to, counsel fees. While the dissenters did
2 mention punitive damages and the fact that they are not measured
3 by attorney's fees, as described above, the majority ignored the
4 dissent. The inference that we appeared to have drawn from the
5 dissent, based in part on our view that separate awards of both
6 punitive damages and counsel fees would be impermissible, id.,
7 was certainly not an inescapable interpretation of the cryptic
8 opinion in Atkinson. Indeed, Kraljic's limitation of punitive
9 damages to counsel fees is an outlier, expressly rejected by some
10 courts, e.g., Hines, 820 F.2d at 1189, simply ignored by others,
11 e.g., Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051-52 (1st
12 Cir. 1973), and adopted by no one outside this circuit. We
13 conclude that it is no longer governing law in this circuit for
14 two reasons.²

15 First, the landscape of Supreme Court caselaw has been
16 substantially altered since Atkinson and Kraljic. In Atlantic
17 Sounding, the Supreme Court held that punitive damages, as
18 traditionally available under the common law, are available in
19 claims arising under federal maritime law, including claims for
20 maintenance and cure. Atlantic Sounding, 557 U.S. at 424. It is
21 incontestable that traditional punitive damages are not limited

²We have circulated this opinion to all active members of this Court prior to filing. See Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 67 & n.9 (2d Cir. 2009); see also Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991).

1 to the amount of attorney's fees. Nowhere in the Atlantic
2 Sounding opinion is there the slightest hint that such damages
3 are limited to counsel fees. While Atlantic Sounding cited
4 Atkinson, id. at 417 -- seemingly relying more on the dissenting
5 than on the majority opinion -- it never stated or implied that
6 such a limit was contemplated, or was even an open issue left to
7 the future. We believe, therefore, that Kraljic's holding did
8 not survive Atlantic Sounding.

9 The landscape has changed in another way that undermines
10 Kraljic. While that opinion relied heavily upon the
11 incompatibility of an award of punitive damages and a separate
12 award of counsel fees, see 575 F.2d at 414, the availability of
13 both punitive damages and attorney's fees awards in the same
14 case, albeit for statutory violations but often on common law
15 grounds with regard to punitive damages, is today not uncommon.
16 See, e.g., Stanczyk v. City of New York, 752 F.3d 273, 275 (2d
17 Cir. 2014) (in Section 1983 case, the jury awarded plaintiff
18 compensatory damages and punitive damages, and the court
19 subsequently awarded attorney's fees); Kolstad v. Am. Dental
20 Ass'n, 527 U.S. 526, 529 (1999) ("[P]unitive damages are
21 available in claims under Title VII of the Civil Rights Act of
22 1964."); Farias v. Instructional Sys., Inc., 259 F.3d 91, 101-03
23 (2d Cir. 2001) (under Title VII, a plaintiff may be entitled to
24 reasonable attorney's fees and punitive damages) (citing Kolstad,

1 527 U.S. at 529); Feltner v. Columbia Pictures Television, Inc.,
2 523 U.S. 343, 346 (1998) and 17 U.S.C. §§ 504, 505 (under the
3 Copyright Act, a court may "increase the award of statutory
4 damages to a sum of not more than \$150,000" and may "award a
5 reasonable attorney's fee"); Fort v. White, 530 F.2d 1113, 1118
6 (2d Cir. 1976) (under the Fair Housing Act, a plaintiff may be
7 awarded actual as well as punitive damages and attorney's fees);
8 35 U.S.C. §§ 284, 285 (under the Patent Act, the court "may
9 increase the damages up to three times the amount found or
10 assessed" and may award "reasonable attorney fees"); accord
11 Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383
12 F.3d 1337, 1347 (Fed. Cir. 2004) (in a patent infringement case,
13 under 35 U.S.C. § 285, "[t]hat there were not actual damages does
14 not render the award of attorney fees punitive. Attorney fees
15 are compensatory, and may provide a fair remedy in appropriate
16 cases."); cf. Jurgens v. CBK, Ltd., 80 F.3d 1566, 1573 n.4 (Fed.
17 Cir. 1996) ("As a general rule, attorneys fees under [35 U.S.C.
18 §] 285 may be justified by any valid basis for awarding increased
19 damages under section 284. However, conduct which a court may
20 deem 'exceptional' and a basis for awarding attorneys fees may
21 not qualify for an award of increased damages. Even where
22 damages are increased under section 284, a court may decline to
23 award attorneys fees under section 285.") (internal citations
24 omitted).

Therefore, Atkinson's holding that an award for attorney's fees may be made where the refusal to pay maintenance and cure was "callous," "willful," and "persistent" is not inconsistent with a punitive award. We also perceive no reason why Atkinson's holding that counsel fees are available for a willful breach of an employer's maintenance and cure obligations is not settled law. Indeed, as noted, Atlantic Sounding cited Atkinson without any hint of reservation as to the award of fees. 557 U.S. at 417. Moreover, Atlantic Sounding also cited, seemingly with approval, a court of appeals decision affirming awards of both punitive damages and fees in maintenance and cure cases. Id. at 408 (citing Hines, 820 F.2d at 1188). Pending further developments in the Supreme Court, we follow those cases.³

CONCLUSION

We therefore affirm.

³We note one small departure from Atkinson. We believe that an award of punitive damages is for the jury while attorney's fees must be awarded under Fed. R. Civ. P. 54(d), which was promulgated in 1993. This departure aligns the award of fees in maintenance and cure cases with post-Atkinson practices regarding fees. See Incandela v. Am. Dredging Co., 659 F.2d 11, 15 (2d Cir. 1981) (trial court assesses attorney's fees after a jury finding that defendant's behavior was "callous" or "recalcitrant").